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80-743

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

SAMUEL SHAPIRO and BELLA SHAPIRO,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the courts of appeals, which have statutory jurisdiction to review decisions of the United States Tax Court "in the same manner and to the same extent as decisions of the district courts in civil actions," may hear an interlocutory appeal of an order of the Tax Court which has been certified under the standards of 28 U.S.C. §1292(b).

2. Whether the United States Tax Court has the power to order the release of funds, seized by the Internal Revenue Service from taxpayers pursuant to a jeopardy assessment, if the funds are needed by the taxpayers, who are otherwise without sufficient means, to pay the costs of counsel and other expenses necessarily incurred in litigating allegations of substantial liabilities for back taxes and penalties.

3. Whether a Tax Court order denying release of funds for payment of counsel fees and litigation expenses to Tax Court petitioners before trial is appealable as a "final collateral order."

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OPINIONS BELOW

The memorandum order of the court of appeals (Pet. App. A, *infra*, pp. 1a-4a) is not yet reported. The opinion of the Tax Court (Pet. App. B, *infra*, pp. 5a-11a) is reported at 73 T.C. 313.

JURISDICTION

The order of the court of appeals dismissing petitioner's appeal from the Tax Court (Pet. App. A, *infra*, pp. 1a-4a) was entered on June 30, 1980. On September 18,

1980, Mr. Justice Marshall entered an order extending the time in which to file a petition for a writ of certiorari to and including October 28, 1980. (Pet. App. E, *infra*, p. 15a). On October 16, 1980, Mr. Justice Marshall entered an order further extending the time in which to file a petition for a writ of certiorari to and including November 7, 1980. (Pet. App. F, *infra*, p. 16a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section 1292(b) of Title 28 of the United States Code provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Section 7421(a) of the Internal Revenue Code (Title 26 of the United States Code) (Supp. 1978) provides:

> Except as provided in sections 6212(a) and (c), 6213(a), 6672(b), 6694(c), 7426(a) and (b)(1), and 7429(b), no suit for the purpose of restraining the

assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

Section 7459(c) of the Internal Revenue Code (Title 26 of the United States Code) provides:

A decision of the Tax Court (except a decision dismissing a proceeding for lack of jurisdiction) shall be held to be rendered upon the date that an order specifying the amount of the deficiency is entered in the records of the Tax Court or, in the case of a declaratory judgment proceeding under part IV of this subchapter or under section 7428, the date of the court's order entering the decision. If the Tax Court dismisses a proceeding for reasons other than lack of jurisdiction and is unable from the record to determine the amount of the deficiency determined by the Secretary, or if the Tax Court dismisses a proceeding for lack of jurisdiction, an order to that effect shall be entered in the records of the Tax Court, and the decision of the Tax Court shall be held to be rendered upon the date of such entry.

Section 7482(a) of the Internal Revenue Code (Title 26 of the United States Code) provides:

The United States Courts of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of Title 28 of the United States Code.

STATEMENT

This case is a sequel to *Commissioner of Internal Revenue v. Shapiro*, 424 U.S. 614 (1976), decided by this Court four and one-half years ago. In 1973, the petitioners, Mr. and Mrs. Samuel Shapiro, were the subject of a jeopardy assessment, see I.R.C. §6861,[1] by which all of their substantial assets were summarily seized or frozen. As a result, they were forced to litigate in the United States Tax Court the validity of allegations by the Internal Revenue Service that they are liable for over $300,000 in back taxes and penalties. In advance of the scheduled trial date, they moved for an order releasing funds from the jeopardy assessment, upon showings that they had no funds available to pay the costs of counsel or other litigation expenses beyond the funds seized by the IRS and that their indigiency seriously jeopardized their opportunity for a fair determination of their tax liability. The Tax Court (Theodore Tannenwald, Jr., *Judge*) denied the motion, holding that it lacked authority to grant the requested relief. However, it certified an immediate appeal to the court of appeals in accordance with the procedure set out in 28 U.S.C. §1292(b). (See Pet. App. D, *infra*, pp. 13a-14a). The court of appeals dismissed that appeal for lack of jurisdiction. (Pet. App. A, *infra*, pp. 1a-4a).

1. The Jeopardy Assessment

In 1972 and 1973, Mr. Shapiro was the subject of extradition proceedings instituted by the Government of Israel. See *Shapiro v. Ferrandina*, 478 F.2d 894 (2d Cir.),

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[1] In this Petition, all citations to the Internal Revenue Code, Title 26 of the United States Code, will be in the form "I.R.C. §____."

cert. dismissed, 414 U.S. 884 (1973), *affirming in part and reversing in part,* 355 F.Supp. 563 (S.D.N.Y. 1973). After extensive litigation, the extradition proceedings were resolved through an agreement under which Mr. Shapiro agreed to surrender voluntarily and return to Israel after the birth of his child, which was expected in late November or early December 1973.

On December 6, 1973, without prior warning of any kind and after Mr. Shapiro's departure for Israel had been set for December 9, the IRS entered a jeopardy assessment for back taxes and penalties totalling approximately $90,000 against Mr. Shapiro. Simultaneously, it seized (through notices of levy) the balances in four bank accounts maintained by Mr. Shapiro—a total of approximately $35,000. In addition, the jeopardy assessment created a lien (I.R.C. §§6321-22) upon the remainder of Mr. Shapiro's real and personal property, including a home in Monsey, New York, in which Mr. and Mrs. Shapiro reside. As a result of these seizures, Mr. Shapiro has for seven years been totally unable to use any of his property, including his bank deposits, to defend himself against the government's allegations of tax liability.

2. The Initiation of Proceedings In the Tax Court

Following the imposition of the jeopardy assessment, the IRS mailed two notices determining deficiencies in the petitioners' tax returns. The first, dated December 12, 1973, alleged a liability of approximately $90,000 arising out of Mr. Shapiro's individual returns for 1970 and 1971. (See Pet. App. B, *infra,* p. 5a). The second, dated April 13, 1976, alleged liabilities totalling almost $240,000 for the petitioners' joint returns for 1972 and 1973. The latter deficiency notice sought the 50%

penalty for fraud against Mr. Shapiro, I.R.C. §6653(b). (See Pet. App. B, *infra*, p. 6a).

The deficiencies were based primarily on the charge that Mr. Shapiro realized on a regular basis, but failed to report, income from very large sales of hashish. The amount of this alleged "unreported income" was computed by assigning to Mr. Shapiro sales of certain quantities of hashish, hypothesizing a selling price and cost per pound, and multiplying to yield a total profit from drug sales. The IRS's "projections" attribute a total of nearly $500,000 in income to Mr. Shapiro for the 1971-1973 period.

Following receipt of each of the IRS deficiency notices, Mr. and Mrs. Shapiro filed, in the Tax Court, timely petitions to redetermine the asserted deficiencies. The petitions also denied all of the factual allegations on which those deficiencies were based. These suits, which were consolidated by the Tax Court, are the source of this Petition.

3. This Court's Decision in A Closely Related Case

In addition to initiating these proceedings in the Tax Court, Mr. Shapiro also filed an action in the United States District Court for the District of Columbia seeking equitable relief from the jeopardy assessment. The complaint alleged that the summary seizure of Mr. Shapiro's property would leave him without any means of making bail in Israel following his imminent return to that country and that he would be unable, once incarcerated, to litigate his tax liability in this country in the Tax Court. See *Commissioner of Internal Revenue v. v. Shapiro,* 424 U.S. 614, 620 (1976). The district court dismissed the complaint, but the court of appeals reversed. *Shapiro v. Secretary of State,* 499 F.2d 527 (D.C. Cir. 1974).

This Court granted the government's petition for certiorari and affirmed. Rejecting the government's contention that relief was barred by the Anti-Injunction Act, 26 U.S.C. §7421(a) (1976), this Court held that when the government has seized a taxpayer's property through a jeopardy assessment, it has an "obligation to disclose the factual basis for its assessments." (424 U.S. at 626-27). In reaching this conclusion, the Court emphasized that a jeopardy assessment is a deprivation of property that must be accompanied by procedural due process. (424 U.S. at 629-34). The opinion recalled and amplified the Court's statement, in *Phillips v. Commissioner*, 283 U.S. 589, 595, 596-97 (1931), that such summary collection procedures can only be reconciled with the requirements of due process "*if the opportunity given for the ultimate judicial determination of the liability is adequate . . .*" (424 U.S. at 631-32) (emphasis in original). Finally, although the Court held that Mr. Shapiro's complaint stated a claim, it also raised the question whether events occurring while the matter had been on appeal had mooted his claim of irreparable injury. Referring to the fact that Mr. Shapiro had for the moment avoided incarceration in Israel, the Court stated that a "preliminary task" on remand would be to determine whether some other sort of irreparable injury could be established. (424 U.S. at 633-34).

On remand in the district court, Mr. Shapiro attempted to satisfy the requirement of irreparable injury by demonstrating that the jeopardy assessment had left him without any resources to finance necessary costs of litigating the substantial claims being asserted against him in the Tax Court. He sought a release of funds for that purpose. The district court found that Mr. Shapiro's

affidavit of indigency was "unquestioned," but held that the proper forum in which to raise the claim that funds should be released to finance Tax Court proceedings was that court. (*Shapiro v. Secretary of State*, 76-2 U.S. Tax Cases (CCH) ¶9507, at p. 84,610 (D.D.C. 1976) (emphasis added)):

> Initially, it is clear to this Court that it lacks jurisdiction to order that monies be released by the defendants so that the plaintiff can continue to litigate in the Tax Court. *That is a matter totally within the ambit of that Court.*

4. The Motion For A Release of Funds In The Tax Court

After various proceedings, a trial date in the Tax Court cases was set for December 10, 1979. As attempts at trial preparation by petitioners' counsel progressed, it became increasingly apparent that the petitioners' inability to pay any counsel fees or even out-of-pocket expenses would make a fair trial virtually impossible. It emerged that none of the government's principal witnesses could be interviewed without incurring substantial travel expenses. Moreover, although many of these witnesses had been convicted or accused of drug-related offenses, counsel did not even have the resources to search available public records for impeachment material or facts that would exculpate Mr. Shapiro.[2] Finally, the lack of funds precluded paying travel expenses to bring favorable witnesses to the trial. For example, one witness had filed an affidavit in the Tax Court attesting that funds characterized by the IRS as income from drug-dealing were

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[2] After his return from Israel, Mr. Shapiro pleaded guilty to a drug-related offense in the Eastern District of New York, and was given a suspended sentence.

actually the proceeds of property that Mr. Shapiro had asked her to hold for safe-keeping, but she resided in Switzerland and was, therefore, inaccessible to counsel.

In short, the petitioners faced the prospect of a trial involving serious allegations of criminal misconduct, but lacked the means to engage in even the most rudimentary trial preparation. Consequently, they filed a motion seeking the release of $15,000 to finance their defense. An uncontested affidavit by counsel established that the petitioners had been unable, since 1975, to pay over $40,000 in fees and expenses. During a hearing on the motion, Mr. Shapiro testified (and was cross-examined) regarding the petitioners' financial straits. He confirmed that they had no substantial assets (other than those seized or frozen under the jeopardy assessment) or sources for borrowing with which to pay necessary litigating costs. He also testified that he and his wife both worked, but had a combined take-home pay of only $325 per week.

5. The Decision of the Tax Court

On this record, Judge Tannenwald issued, on November 26, 1979, an Opinion and Order denying the motion. (Pet. Apps. B and C, *infra*). As an initial matter, he found that (p. 7a, *infra*):

> [A]t the present time, neither of the petitioners has sufficient assets or sources of income or funds from which to pay litigation costs.

He also recognized that the effect of the jeopardy assessment had been severe, observing that "the unavailability of funds obviously has a direct and adverse impact upon the ability of a taxpayer to be provided with the effective assistance of counsel" and that "there is an element of unfairness involved [which] cannot be denied,

particularly where, as is the case herein, such funds would in all likelihood have been available but for" the jeopardy assessment. *Id.*

Nevertheless, Judge Tannenwald concluded that he had "no alternative but to deny petitioner's motion." He ruled that the requested release of funds was barred by the Anti-Injunction Act, I.R.C §7421(a), and that the Shapiros' only recourse was to articipate in the trial and then seek a post-trial determination of the jeopardy assessment's impact on its fairness (pp. 9a-11a, *infra*).

6. Certification Of An Appeal Under Section 1292(b)

Petitioners filed a notice of appeal[3] and also moved for certification of an appeal under the procedures set out in 28 U.S.C. §1292(b). On February 4, 1980, Judge Tannenwald modified his prior order to include the two findings required by 28 U.S.C. §1292(b). He certified (1) that the order "involv[ed] a controlling question of law as to which there is substantial ground for difference of opinion," and (2) that "an immediate appeal . . . may materially advance the ultimate termination of the litigation." (Pet. App. D, *infra*, p. 13a). With regard to the latter finding, the judge determined that an immediate appeal could "[afford] petitioners a greater opportunity for a full and complete trial . . . and [avoid] a possible protracted and expensive retrial . . ."[4]

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[3]The notice was predicated on the theory that the denial of the release of funds was a "final collateral order" within the meaning of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), and its progeny.

[4]Proceedings in the Tax Court were stayed pending appellate review.

7. The Decision of the Court of Appeals

The petitioners made a timely application for leave to bring a discretionary appeal. The government opposed this application and moved to dismiss the appeal. After plenary briefing and argument (as to both jurisdiction and the merits), the court of appeals denied the petitioners' motion for leave to appeal and granted the government's motion to dismiss (Pet. App. A, *infra*, pp. 1a-4a).

The court of appeals confirmed that the issue presented by the appeal was "important" (p. 2a, *infra*):

> [T]he question whether an IRS jeopardy assessment can be used to freeze assets of a taxpayer needed to pay attorney's fees and to prepare his case fully is a question that has never been resolved by this court and appears to raise an important legal question.

Indeed, the Court observed that had the appeal originated in a district court, it "might well accept a certification [under Section 1291(b)]." However, the court of appeals interpreted the relevant jurisdictional statutes to foreclose this procedure. It stated that the references to "district court" and "district judge" in Section 1292(b), preclude its use in Tax Court cases. It also held that Section 7482(a) of the Internal Revenue Code (see p. 3, *supra*), which prescribes review of Tax Court decisions "in the same manner and to the same extent" as district court decisions, did not encompass the order denying a release of funds.

REASONS FOR GRANTING THE WRIT

A highly experienced Tax Court judge and the Court of Appeals for the Circuit which includes the financial hub of the United States both believe that the substantive constitutional issue presented in this case is important. (See pp. 12a, 13a-14a, *infra*).[5] Whether the same government agency may, in one official action, preemptorily seize all of an individual's property, and, at the same time, refuse to release funds so he can defend himself against the agency's effort to secure an enormous tax judgment against him raises serious Due Process questions. Not only do these questions affect the intrinsic fairness of any Tax Court proceeding, but they present an issue which is likely to recur. Nonetheless, refusing to apply literally the governing statutory provision, which would permit courts of appeals to consider issues of this kind if they and the trial judge of the Tax Court believe interlocutory appeal is warranted, the court below dismissed the only meaningful opportunity a taxpayer has to present this issue for judicial examination.

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[5] Judge Tannenwald explained his certification at the conclusion of oral argument as follows:

> I also am prepared to certify because . . . I feel strongly enough about the importance of the basic substantive issue that's involved, namely, the availability of funds to a taxpayer who has no other sources of funds, other than those that have been seized by the government, to conduct what is important litigation to him, that that's a sufficiently important question that I'd like the record to show . . . to the Court of Appeals that I believe that this is a sufficiently important issue that they ought to take hold of it and deal with it as promptly and as expeditiously as possible.

1. The Court of Appeals Erroneously Foreclosed Judicial Discretion To Hear Interlocutory Appeals From The Tax Court

The court of appeals saw petitioners' appeal as one it "might well accept," recognizing that it raised "an important legal question" which it had not resolved, and that the "alleged imposition on the taxpayers . . . appears to be substantial." (See p. 2a, *infra*). Yet it concluded that the relevant statutes foreclosed a discretionary appeal. Section 7482(a) of the Internal Revenue Code (See p. 3, *supra*) provides clearly and unequivocally that the courts of appeals have jurisdiction to review Tax Court decisions "in the same manner and to the same extent" as decisions of the district courts. The statutory language does not require, in addition, that a statute such as 28 U.S.C. §1292(b), describing one "manner" in which district court decisions are reviewed, "state explicitly" that it is applicable to Tax Court decisions. Nor does it limit the courts of appeals to those "manners" of review which existed prior to the passage of Section 7482(a).[6]

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[6]There is nothing in the legislative history of 28 U.S.C. §1292(b) that suggests that Congress rejected the concept of making discretionary appeals available in Tax Court proceedings. In *Commissioner v. Smith Paper, Inc.*, 222 F.2d 126 (1st Cir. 1955), the First Circuit did state that Section 7482(a) did not incorporate by reference the jurisdictional statutes which govern appeals from the district courts. However, the procedural posture of that case makes it weak authority. The *Smith Paper* court's position on Section 7482(a) had not been argued by either party, see 222 F.2d at 127-28, and, as the First Circuit recognized, it was unnecessary to the decision in the case. The order on appeal was "in substance no more than an interlocutory procedural order striking an amendment to the Commissioner's answer" which would not have been appealable under any jurisdictional provision available in the district courts.

The court of appeals erroneously concluded that the phrase "decisions of the Tax Court" in Section 7482(a) is a term of art limited to "*final* Tax Court decisions." This suggestion was based upon several cases following the Second Circuit's one-page opinion in *Michael v. Commissioner*, 56 F.2d 825 (2d Cir. 1932), which have relied upon the meaning of the term "decision" as used in Section 7459(c) of the Internal Revenue Code. (*See* p. 3, *supra*). However, the *Michael* case was decided before Congress authorized discretionary appellate review of interlocutory rulings in 28 U.S.C. §1292(b). Moreover, Section 7459(c) does not purport to be a definitional section. It is no more than a housekeeping provision fixing the date on which a Tax Court ruling is final. As the Sixth Circuit stated in *Louisville Builders Supply Co. v. Commissioner,* 294 F.2d 333, 336 (6th Cir. 1961):

> If Congress intended to make such a limiting definition of the words, "decisions of the Tax Court" it could have done so in precise language. We are not persuaded that Congress left such an intent to be inferred from the language of a subsection of the statute which had for its only purpose the fixing of the date to be applied to certain types of decisions.

More modern decisions have not followed the Second Circuit's literalistic approach. In *Ryan v. Commissioner,* 517 F.2d 13 (7th Cir.), *cert. denied,* 423 U.S. 892 (1975), the Seventh Circuit resolved the issue of the appealability of a Tax Court discovery order by reference to its cases on analogous orders in the district courts. And in *Ryan v. Commissioner,* 568 F.2d 531 (7th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978), the same court

undertook review of a contempt order that would not have fit the "definition" set out in Section 7459(c).[7]

The decision of the court of appeals needlessly disables the Tax Court from resolving issues of law promptly when a decision could "materially advance the ultimate termination of the litigation," as prescribed by Section 1292(b). Under this statute, interlocutory appeals cannot be forced upon tribunals which do not believe they meet such rigorous standards. Indeed, the impetus for the passage of Section 1292(b) was provided by trial judges themselves. It was "judge-sought, judge-made, judge-sponsored" legislation, *Hadjipateras v. Pacifica, S.A.*, 290 F.2d 697 (5th Cir. 1961), whose purpose was to give trial judges, under the watchful eye of an appellate panel, flexible means of obtaining prompt appellate resolution of difficult and unsettled legal questions without first having to commit valuable judicial resources to further proceedings that may be wiped out on appeal.

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[7]Nor has the word "decision" been used as a term of art in other provisions of the Tax Code. The immediately following section (§7460) uses the words "determination" and "final disposition" in referring to orders which conclude the Tax Court litigation. Indeed, subsection 7460(b) speaks of a "final decision," a patent superfluity if the term "decision" itself means only a "final" judgment.

And the Tax Court itself has not given the same meaning to the term "decision" that the Court below applied. In its Rules, the Tax Court describes as "decisions" its dispositions of motions for complete or partial summary judgment (*see* Rule 121(b), U.S. Tax Ct. Rules) and rulings following a default judgment (*see* Rule 123(b)). Surely the Tax Court would have chosen to assign a different label to these interlocutory rulings if the term "decision" was the talisman of appellate review.

In a manageable but significant number of cases,[8] the availability of discretionary appeals results in substantial savings to courts and litigants. In the paradigm cases, a timely interlocutory appeal will vitiate the risk that disagreement between a trial court and the court of appeals on a central, and concededly debatable, point of law will result in an expensive and time-consuming second trial. There is no reason to believe that such savings in resources are any less available or any less valuable in the Tax Court than in the district courts.

Finally, there is no reason for this Court to wait for a conflict among Courts of Appeals before reviewing this issue. In view of the decision of the Second Circuit, it is most improbable that any Tax Court judge will, in the future, certify an interlocutory ruling for immediate appellate review, even if he believes that the criteria of Section 1292(b) have been met.[9] Consequently, the ruling below effectively decides the issue for all time, since the question can only reach a court of appeals if and when a certification is made by the trial judge.

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[8] One commentator has reported that about 100 applications under Section 1292(b) are lodged each year and that about half are granted. Note, *Interlocutory Appeals in the Federal Courts Under 28 U.S.C. §1292(b)*, 88 Harv.L.Rev. 607, 609 n.5 (1975).

[9] Indeed, the government represented to the court below that the availability of an interlocutory appeal "appears" to be "a recurring question" in seeking to have the decision below published for its use as authority. It then utilized the published opinion in securing a dismissal of another interlocutory appeal which a Tax Court judge had certified. *Tirado v. Commissioner*, (2d Cir.) No. AD-8099 (petition for leave to appeal denied) (August 19, 1980). It seems unlikely, in light of these actions, that a Tax Court judge will ever be hardy enough to certify any future interlocutory appeal.

2. Petitioners' Important Due Process Claim Cannot Practically Be Deferred Until After Their Trial

After seizing all of petitioners' assets, the Internal Revenue Service served notices of deficiency which add up to a claim for back taxes and penalties totalling over $300,000. This confonts the petitioners with the prospects of permanently losing the property which was the subject of the jeopardy assessment and of overall financial ruin. The only way the petitioners can avoid the permanent loss of their property is to litigate in the Tax Court. There, the IRS is represented by experienced counsel and will have the assistance of government agents in preparing and presenting its case. Rules of evidence and procedure will be in effect, and the outcome at trial may well depend on the petitioners' ability to impeach through cross-examination adverse witnesses who can be expected to testify that Mr. Shapiro engaged in drug-dealing. But the petitioners will have no money to pay for any of the necessary trial preparation or the cost of counsel.

Both courts below took notice of the obvious unfairness of the situation. The Tax Court observed that "the unavailability of funds obviously has a direct and adverse impact upon the ability of a taxpayer to be provided with the effective assistance of counsel." (p. 7a, *infra*). The court of appeals confirmed that the "imposition" on the petitioners "appears to be substantial." (p. 2a, *infra*).

The problem is a recurring one. The Tax Court has previously wrestled with the issue, *Human Engineering Institute v. Commissioner*, 61 T.C. 61, 66-68 (1973), and it is fair to assume that a jeopardy assessment may frequently tie up the assets that a taxpayer could otherwise commit to the Tax Court litigation.

This Court recently re-emphasized that the jeopardy assessment procedure cannot be squared with Due Process unless the taxpayer obtains an "adequate" subsequent opportunity to contest the alleged tax liability. *Commissioner of Internal Revenue v. Shapiro,* 424 U.S. 614, 631-32 (1976). That standard is not met where, as here, the jeopardy assessment operates to deprive a taxpayer of the only assets available to present a case in the Tax Court. Thus, this is not at case testing whether a litigant against the government in a civil lawsuit is entitled to have an attorney appointed to represent him.[10] In this case, the same government agency simultaneously disables the individual from adequately contesting the agency's cliam while pursuing that cliam in a judicial forum. This is a double-barreled attack which, we submit, cannot be constitutionally permissible.

The Tax Court must have the inherent authority to assure that its proceedings meet minimum constitutional standards. Like any other court, it bears the ultimate responsibility for the conduct of its proceedings. It is best situated to make the discretionary judgment whether the jeopardy assessment poses a fundamental threat. And it is best able to supervise the release of funds and their commitment to litigation of contested liabilities. This was the conclusion reached by the United States District Court for the District of Columbia in this case when it held that a release of funds to finance Tax Court

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[10]In several recent decisions, this Court has recognized that the assistance of counsel is essential in even relatively minor criminal confrontations between an individual and the government. See *Baldasar v. Illinois,* 100 S.Ct. 1585 (1980); *Argersinger v. Hamlin,* 407 U.S. 25 (1972).

litigation "was a matter totally within the ambit of that Court." (See p. 8, *supra*).

Nor does this case involve a situation, like *United States v. Brodson* 241 F.2d 107 (7th Cir. 1957), and its progeny, where the decision on how to respond to the unfairness posed by a jeopardy assessment could be postponed until after a trial had been held. Unlike *Brodson*, the taxpayers are not seeking dismissal of an indictment (or any form of relief which amounts to a disposition in their favor), but only the opportunity to litigate in a fair proceeding. Subsequent review would be inadequate, since the trial record will not reveal the omissions that would accompany inadequate preparation or the inability to compensate counsel. *See Cuyler v. Sullivan*, 100 S.Ct. 1708 (1980); *Holloway v. Arkansas*, 435 U.S. 475, 491-92 (1978).

3. The Court of Appeals Misapplied This Court's Decisions In Refusing To Treat The Tax Court's Order As A Reviewable Collateral Order

The court of appeals erroneously concluded that the "collateral order" standard for appellate review most recently applied by this Court in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), is not satisfied because "the denial of the taxpayers' motion may be reviewed on the entry of a final judgment." (p. 3a, *infra*). In fact, as we have previously shown, it is highly improbable that the true impact of the deprivation of the effective assistance of counsel could be proved more specifically at that juncture than it can today. And the substantial harm of putting petitioners through an unfair trial will have been done. A ruling such as the one at issue here—which refuses to release funds for purposes which are not

dependent upon the ultimate merits of the claim—is a classic illustration of an order which "conclusively determine[s] the disputed question, resolve[s] an important issue completely separate from the merits of the action, and [is] effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). See *Abney v. United States*, 431 U.S. 651, 658 (1977); *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949).

The order is analogous to rulings concerning prejudgment security that this Court and lower courts have held to be final collateral orders for purposes of appellate review. *Cohen v. Beneficial Industrial Loan Corp., supra,* was itself an appeal of an order denying security for costs. *See also Fielding v. Allen,* 181 F.2d 163 (2d Cir.), *cert. denied*, 340 U.S. 817 (1950); *Chabot v. National Securities & Research Corp.*, 290 F.2d 657 (2d Cir. 1961); cf. *Swift & Co. Packers v. Compania Colombiana Del Caribe*, 339 U.S. 684, 688-89 (1950) ("the provision for appeals only from final decisions . . . should not be construed so as to deny effective review of a claim fairly severable from the context of a larger litigious process.").

The decision below was inconsistent with the standards this Court has applied in determining appealability under 28 U.S.C. §1291. It should be promptly reversed.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second held at the United States Court House, in the City of New York, on the thirtieth day of June, one thousand nine hundred and eighty.

Present:

Hon. James L. Oakes,
Hon. Ellsworth A. Van Graafeiland,
Circuit Judges.
Hon. Edward R. Neaher,
District Judge.

Filed: June 30, 1980

Samuel Shapiro,

Appellant,

v.

Commissioner of Internal Revenue,

Appellee.

Samuel and Bella Shapiro,

Appellants,

v.

Commissioner of Internal Revenue,

Appellee.

ORDER

In our view taxpayers' motion for leave to appeal under 28 U.S.C. §1292(b) should be denied and the Commissioner's motion to dismiss the appeal should be granted.

If this were an appeal from the interlocutory order of a district court as opposed to the Tax Court, we might well accept a certification, because the question whether an IRS jeopardy assessment can be used to freeze assets of a taxpayer needed to pay attorneys' fees and to prepare his case fully is a question that has never been resolved by this court and appears to raise an important legal question. The Tax Court judge here stated he felt the case was "difficult," and he certified the question for appeal after refusing to release the funds requested. The resolution of this issue arguably could affect the outcome and conduct of the trial, and the alleged imposition on the taxpayers in not having access to these funds to proceed with their litigation appears to be substantial.

The argument of the Commissioner that an appeal cannot be taken under §1292(b) from an interlocutory order of the Tax Court is irrefutable, however. The language of §1292(b) refers only to orders by a "district judge" and proceedings in a "district court," making no reference to orders of any other court. Moreover, Fed. R. App. P. 5, governing appeals from interlocutory orders under §1292(b), also refers solely to the "district court," and Rule 5 is expressly excluded from application to the Tax Court by Rule 14.

Taxpayers attempt to rely on the language of 26 U.S.C. §7482(a) giving courts of appeal jurisdiction to review Tax Court decisions "in the same manner and to the same extent as decisions of the district courts in civil

actions tried without a jury." But, as the Commissioner points out, this sentence has always been interpreted to apply to *final* Tax Court decisions, and there is no indication that the sentence was meant to encompass appeals of interlocutory Tax Court orders by implicitly incorporating into the term "decision of the district court" interlocutory orders of district court appealable under §1292. *See Commissioner v. Smith Paper, Inc.*, 222 F.2d 126, 128 (1st Cir. 1955). Indeed, §1292(b) was added to the Code ten years after the "same extent" language in §7482(a), and hence the fact that §1292(b) only refers to "district courts" indicates that there was no intention under §7482(a) to make interlocutory Tax Court orders appealable when any such intention could have been stated explicitly in §1292(b).

And since this is clearly not a final decision, the alternate notice of appeal under §1292 is unavailing. The attempt to invoke the "collateral order" doctrine of *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541 (1949), is equally so. The requirements of *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978), are not met since the denial of the taxpayers' motion may be reviewed on the entry of a final judgment. As the Eighth Circuit said in a different context, assuming arguendo that the taxpayers have a constitutional right to be represented by competent counsel in tax court proceedings, "it does not follow that they have a constitutional right to be represented by a particular law firm for a particular fee agreed upon in advance." *See Rosenblum v. United States*, 549 F.2d 1140, 1146 (8th Cir.), *cert. denied*, 434 U.S. 818 (1977); *cf. Association of National Advertisers, Inc. v. FTC*, 565 F.2d 237, 240 (2d Cir. 1977) (expense of administrative proceeding precluding proper preparation not sufficiently irreparable to give interlocutory jurisdiction to district jurisdiction).

Appeal dismissed; leave to appeal under 28 U.S.C. §1292(b) denied for lack of jurisdiction.

Circuit Judges.

District Judge.

APPENDIX B

UNITED STATES TAX COURT

SAMUEL SHAPIRO, Petitioner *v.* COMMISSIONER OF INTERNAL REVENUE, Respondent

SAMUEL SHAPIRO and BELLA SHAPIRO, Petitioners *v.* COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket Nos. 178-74, 6489-76. Filed November 26, 1979.

Held, petitioners are not entitled to an order directing respondent to release funds subject to a lien of a jeopardy assessment in order to pay fees to counsel for representation in the above-docketed cases.

Nathan Lewin, for the petitioner.

St. Clair Reeves, for the respondent.

OPINION

TANNENWALD, *Judge*: Respondent has asserted deficiencies in petitioners' income taxes as follows:

			Additions to tax		
Docket No.	Year	Deficiency of tax	Delinquency (Sec. 6651(a),[1] IRC 1954)	Negligence (Sec. 6653(a), IRC 1954)	Under estimation of tax (Sec. 6654(a), IRC 1954)
178-74	1970	$ 5,137.89	$1,284.47	$ 256.90	$164.42
	1971	79,368.50	—	3,968.43	—

[1] All statutory references, unless otherwise indicated, are to the Internal Revenue Code of 1954, as amended.

Docket No.	Year	Addition to tax: Deficiency of tax	Addition to tax: Fraud (Sec. 6653(b), IRC 1954)	Liability of Bella Shapiro limited to deficiency of tax
6489-76	1972	$ 22,562.63	$11,281.31	$ 22,562.63
	1973	136,578.10	68,289.05	136,578.10

Respondent also, on December 6, 1973, issued a jeopardy assessment and seized some $35,000 of assets in respect of the tax liabilities asserted in docket No. 178-74.

With minor exceptions, the asserted deficiencies are based upon income alleged to have been derived from dealings in narcotics by Samuel Shapiro and reflect projections of such income based upon alleged specific transactions.[2]

On September 28, 1979, petitioners filed a motion for the release of $15,000 from the lien created as the result of the jeopardy assessment in order to enable petitioner to pay attorneys' fees and costs in connection with the above-docketed cases. A hearing was held in respect of said motion on October 24, 1979, at which petitioner Samuel Shapiro testified as to the financial position of himself and his wife, who is the co-petitioner in docket No. 6489-76.

[2] There has been extensive ancillary litigation with respect to matters related to those involved in the above-docketed cases. *Commissioner v. Shapiro*, 424 U.S. 614 (1976); *Shapiro v. Secretary of State*, an unreported case (D.D.C. 1976, 38 AFTR 2d 76-5453, 76-2 USTC par. 9507), and subsequent hearing held on July 6, 1976 in that action. Throughout the proceedings herein and in these cases, petitioners have been represented by counsel.

Although the record as to petitioner's financial position is not crystal clear, at least as far as concerns the possible availability, for the payment of litigation costs, including counsel fees, of assets not subject to the jeopardy assessment during earlier periods of the pendency of these cases, we are satisfied and we find that, at the present time, neither of the petitioners has sufficient assets or sources of income or funds from which to pay such litigation costs.

The issue of the release of funds, which are the subject of a jeopardy assessment, to pay litigation costs of a taxpayer who has no other sources for the payment of such costs is a difficult one. See *Human Engineering Institute v. Commissioner*, 61 T.C. 61, 66-68 (1973). On the one hand, there is no question that, as able counsel for petitioners has so forcefully argued, the unavailability of funds obviously has a direct and adverse impact upon the ability of a taxpayer to be provided with the effective assistance of counsel. That there is an element of unfairness involved cannot be denied, particularly where, as is the case herein, such funds would in all likelihood have been available but for the action of respondent in making the jeopardy assessment.

On the other hand, the courts have recognized the barrier of the Anti-Injunction Act (section 7421(a))[3] and have held that in order for a taxpayer to avoid the impact

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[3] That section provides:

SEC. 7421(a). Tax—Except as provided in sections 6212(a) and (c), 6213(a), 6672(b), 6694(c), 7426(a) and (b)(1), and 7429(b), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

of that act, where a jeopardy assessment is involved, he is required to show that (a) he will suffer irreparable injury and (b) under no circumstances could the Government ultimately prevail. See *Commissioner v. Shapiro*, 424 U.S. 614, 623 (1976); *Enochs v. Williams Packing Co.*, 370 U.S. 1, 7 (1962). The underlying purpose of such a restrictive view is to assure the Government of its ability to collect revenue promptly. See *Enochs v. Williams Packing Co., supra.* To a certain extent, that restrictive view has been statutorily relaxed by the enactment of section 7429 in 1976 permitting review of a jeopardy assessment by United States District Courts to determine whether it is "reasonable under the circumstances." See section 7429(b)(2)(A).[4] In this connection, we note that there is not the slightest suggestion in the legislative history of section 7429 that the review of jeopardy assessments provided for therein should include a power to release funds to pay litigation costs and it is obvious that the statute itself does not so provide. See H. Rept. 94-658, 299-304 (1975), 1976-3 C.B. (Vol. 2) 695, 991-996; S. Rept. 94-938, 359-367 (1976), 1976-3 C.B. (Vol. 3) 49, 397-405. Moreover, we think it of some significance that, when Congress recently provided for the allowance of attorneys' fees as part of litigation costs in connection with suits by the United States Government to enforce the provisions of the Internal Revenue Code (Pub. L. 94-559, 90 Stat. 2641, amending 42 U.S.C. sec. 1988; see also *Key Buick Co. v. Commissioner*, 68 T.C. 178 (1977), on appeal (5th Cir., Aug. 15, 1977)), it

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[4] That section is not applicable herein, not only because this Court is not given jurisdiction over such actions, but also because it was made applicable only where notice and demand for the payment of the tax occurs after February 28, 1977.

limited such allowance to the "prevailing party," which quite obviously postpones the determination until the conclusion of the litigation.

Where the courts have been faced with the problem, they have uniformly refused, albeit sometimes reluctantly, to sanction the release of funds for the purpose of paying litigation costs, including counsel fees, on the ground that the only basis for a constitutional claim on the part of the taxpayer, whose assets have been seized, is the guaranty of a fair trial under the due process clause of the Constitution—a determination which they have held can only be made post-trial. See *Avco Delta Corp. Canada Ltd. v. United States*, 540 F.2d 258 (7th Cir. 1976) and 484 F.2d 692 (7th Cir. 1973); *United States v. Marshall*, 526 F.2d 1349 (9th Cir. 1975); *United States v. Bello*, 470 F. Supp. 723 (S.D. Cal. 1979); *Stone v. United States*, 405 F. Supp. 642 (S.D.N.Y. 1975), affd. without published opinion 538 F.2d 314 (2d Cir. 1976); see *Human Engineering Institute v. Commissioner, supra,* and cases cited and discussed at 61 T.C. 67. See also *Rosenblum v. United States*, 549 F.2d 1140 (8th Cir. 1977). In reaching their conclusions, the courts have frequently observed that, in any event, there is no constitutional right to obtain funds to pay for counsel of one's own choosing. See *United States v. Marshall, supra* at 1355; *United States v. Bello, supra* at 725; *Human Engineering Institute v. Commissioner, supra* at 67. Nor have the courts found any basis for applying a different approach where a criminal prosecution was involved. See *United States v. Marshall, supra; United States v. Brodson*, 241 F.2d 107 (7th Cir. 1957); *United States v. Bello, supra.* Under these circumstances, we find unpersuasive petitioners' attempt to distinguish the decided cases on the ground that the deficiency notices herein are

rooted in alleged criminal activity, i.e., dealing in narcotics. See also *Helvering v. Mitchell*, 303 U.S. 391 (1938).

Similarly, petitioners' attempt to invoke the Sixth Amendment must also fail; aside from the question whether that amendment provides any constitutional basis for *the payment* of counsel fees, it applies only to criminal prosecutions. *Hannah v. Larche*, 363 U.S. 420, 440, n. 16 (1960); *United States v. Zucker*, 161 U.S. 475, 480-481 (1896); *United States v. Rogers*, 534 F.2d 1134, 1135 (5th Cir. 1976); *Ferguson v. Gathright*, 485 F.2d 504, 506 (4th Cir. 1973); *Grabinger v. Conlisk*, 320 F. Supp. 1213, 1218 (N.D. Ill. 1970).

Moreover, we are, in any event, not prepared to accept petitioners' attempt to invoke what they describe as the doctrine of affirmative government interference with the lawyer-client relation, citing *Geders v. United States*, 425 U.S. 80 (1976) (ability to consult with counsel), and *Black v. United States*, 385 U.S. 26 (1966) (monitoring of attorney-client conversation) and extend any such doctrine to the financial relationship, as distinguished from the privilege in respect of communications. Nor does petitioners' reliance on the All Writs Act (28 U.S.C. sec. 1651) have any merit. See *Shapiro v. Secretary of State*, an unreported case, footnote 1, *supra*. Whatever thrust that Act may have in respect of actions by this Court as a court "established by Act of Congress" must yield to the specific prohibitions contained in the anti-injunction provisions of section 7421(a). Cf. *Enochs v. Williams Packing Co., supra*, in which the Supreme Court indicated that, where it is clear that the Government will under no circumstances prevail, the alleged tax is really not a tax, with the result that the anti-injunction

provisions do not apply. See 370 U.S. at 7. In *Commissioner v. Shapiro, supra,* the Supreme Court carefully preserved that rationale, merely holding that a taxpayer is entitled to an opportunity to show that a jeopardy assessment is without any basis in fact. See 424 U.S. at 629.

In light of the foregoing, we conclude that we have no alternative but to deny petitioner's motion. We think that it is also appropriate to observe that whatever vitality our comment in *Human Engineering Institute v. Commissioner*, 61 T.C. at 67-68, regarding the possibility of "some action by the trial judge" in situations of this kind, may have had at the time it was made has been sapped to the point of nonexistence by subsequent judicial and legislative developments.

An appropriate order will be issued.

APPENDIX C

UNITED STATES TAX COURT

WASHINGTON

SAMUEL SHAPIRO,

Petitioner,

v. Docket No. 178-74

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

SAMUEL SHAPIRO and BELLA SHAPIRO,

Petitioners,

v. Docket No. 6489-76

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ORDER

Petitioners having, On September 28, 1979, filed a Motion for a Release of Funds to Pay Petitioners' Litigation Expenses and a hearing having been held thereon on October 24, 1979, it is

ORDERED that, for the reasons appearing in the Opinion of the Court, filed November 26, 1979, petitioners' motion is denied.

Dated: Washington, D.C.
November 26, 1979

Judge

APPENDIX D

UNITED STATES TAX COURT

WASHINGTON

SAMUEL SHAPIRO, ET AL.,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket Nos. 178-74, 6489-76.

ORDER

Pursuant to the Opinion filed on November 26, 1979, the Court issued an order, dated November 26, 1979, denying the petitioners' motion to release funds to pay petitioners' litigation expenses. Petitioners, on January 31, 1980, filed a notice of appeal from said order and, on the same date, filed a motion to supplement said order of the Court dated November 26, 1979 so as to include therein a statement for an interlocutory appeal pursuant to 28 U.S.C. sec. 1292(b). After due consideration of petitioners' motion and the grounds set forth in support thereof and after argument in open court on February 4, 1980, it is the opinion of the Court that its order dated November 26, 1979 involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from said order may materially advance the termination of this litigation. Accordingly, it is

ORDERED that petitioners' motion to supplement the Court's order dated November 26, 1979 be, and the same

hereby is, granted and said order is hereby modified by including herein the additional provisions required by 28 U.S.C. sec. 1292(b), to wit:

> This order involves a controlling question of law as to which there is a substantial ground for difference of opinion, namely, whether this Court has the power and authority to order the release of funds, seized by respondent pursuant to a jeopardy assessment, to pay litigation costs of a taxpayer who has no other sources for the payment of such costs, and as to which an immediate appeal from said order may materially advance the ultimate termination of this litigation, including, but not limited to, affording petitioners a greater opportunity for a full and complete trial of the above-docketed cases and the avoidance of a possible protracted and expensive retrial of such cases.

Judge

Dated: Washington, D.C.
February 4, 1980

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. A-249

SAMUEL SHAPIRO AND BELLA SHAPIRO,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 28, 1980.

/s/ Thurgood Marshall
Associate Justice of the Supreme
Court of the United States

Dated this 18th
day of September, 1980.

APPENDIX F

SUPREME COURT OF THE UNITED STATES

No. A-249

SAMUEL SHAPIRO, ET AL.,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE

ORDER FURTHER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, further extended to and including November 7, 1980.

/s/ Thurgood Marshall
Associate Justice of the Supreme
Court of the United States

Dated this 16th
day of October, 1980.